Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

KELLY SCOTT RUNDELL, QUENTIN MERLD RUNDELL, SR., PATRICIA RUNDELL, AND QUENTIN MERLD RUNDELL, JR.,
Petitioners,

v.

HASTINGS MUTUAL INSURANCE CO. AND SHIRLEY GWEN HUNTER AND JAMES FLYNN HUNTER,
Respondents.

Petition for a Writ of Certiorari to the Michigan Court of Appeals for the First District

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Michigan Court of Appeals erred in not holding that it was fundamentally unfair, shocking the conscience, uncivilized, for Kelly Scott Rundell, an insane man, diagnosed paranoid schizophrenic, to be required to perform to the level of the normal, ordinary reasonable man as required by Michigan Model Civil Jury Instruction 13.03, Mental Illness-Adult Pet. App. 79a, an impossible performance level, in violation of the Due Process Clause of the FOURTEENTH AMENDMENT of the United States Constitution? Pet. App. 77a.

2. Whether the Michigan Court of Appeals erred in not holding that it was a denial of the of the equal protection of the law in violation of the FOURTEENTH AMENDMENT OF THE United States Constitution for Michigan Model Civil Jury Instruction 13.03, Mental Illness-Adult Pet. App 79a, to require Kelly to perform to the level of the normal, ordinary reasonable man, an impossible performance level, while not requiring an impossible performance level of any other citizens.

3. Whether the Michigan Court of Appeals erred in not holding that it was a cruel and unusual punishment for being sick and a discrimination against the insane, to require Kelly, an insane man, diagnosed paranoid schizophrenic, to be required to perform to the level of the normal, ordinary reasonable man, as required by Michigan Model Civil Jury Instruction 13.03, Mental Illness-Adult Pet. App.79a, an impossible performance level, in violation of the EIGHTH AMENDMENT of the United States Constitution? Pet. App. 77a.

4. Whether the Michigan Court of Appeals in violation of the equal protection of the law clause in the FOURTEENTH AMENDMENT of the United States Constitution erred in not holding that Kelly's illness of paranoid schizophrenia was a physical brain disorder rendering him physically disabled under Michigan Model Civil Jury Instruction 13.01, Physical

Disability Pet. App.78a, and requiring him to perform only to the level of a person with a similar disability?

5. Whether the Michigan Court of Appeals erred in not abolishing Michigan Model Civil Jury Instruction 13.03 Mental Illness Adult, Pet. App. 79a, since brain Imaging, Pet. App. 21a-24a and 41a-76a, since 1970 has given clear and convincing evidence that those illnesses are physical brain disorders rendering the victim physically disabled and that those sick people should be included under Michigan Model Civil Jury Instruction 13.01 Physical Disability, Pet. App. 78a, and with the United States diagnostic authority for psychiatrists, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION TEXT REVISION, DSM-IV, tm, saying on page XXX Introduction that the term "mental" disorders is a "reductionistic anachronism" and that a substitute term is needed as a solution with those physical brain disorders being included as physical disabilities as the obvious solution?, Pet. App. 18a.

6. Whether the Michigan Court of Appeals erred in not abolishing the common law rule that the insane must perform to the level of the normal, ordinary reasonable man, an impossible performance level. just as the United States Supreme Court did in replacing *Plessy v Ferguson*, 163 U.S. 537 (1896) with *Brown v The Board of Education* 347 U.S. 483 (1954) to eliminate the impossibility of the "Separate but Equal" doctrine?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties before the Michigan Court of Appeals.

The petitioners are Kelly Scott Rundell, Quentin Merld Rundell, Sr., Patricia Rundell, And Quentin Merld Rundell, Jr.

The respondents are Hastings Mutual Insurance Co. and Shirley Gwen Hunter and James Flynn Hunter.

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OPINIONS BELOW

The order of the Michigan Supreme Court denying the motion for reconsideration is not published. Pet. App. la. The order of the Michigan Supreme Court denying applications for leave to appeal is not published. Pet. App. 2a-3a. The opinion of the Michigan Court of Appeals is not published. Pet. App. 4a-13a . The opinion of the Oakland County Circuit Court is not published. Pet. App. 14a-17a.

JURISDICTION

The Michigan Court of Appeals entered its judgment on July 1, 2003. The Michigan Supreme Court denied applications for leave to appeal on December 27, 2004. The Michigan Supreme Court denied motion for reconsideration on March 29, 2005. The Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL AMENDMENTS AND MICHIGAN MODEL CIVIL JURY INSTRUCTIONS INVOLVED

This case involves cruel and unusual punishment under the EIGHTH amendment and due process of law and equal protection of the law under the FOURTEENTH amendment to the United States Constitution, Pet. App. 77a and the Michigan Model Civil Jury Instructions 13.01 Physical Disability, Pet. App. 78a and 13.03 Mental Illness-Adult. Pet. App. 79a.

STATEMENT OF THE CASE

This case involves the last frontier of civil rights, the insane who number in the millions in the United States and to each of whom this case applies. Throughout the history of the human race, the insane have been the people most discriminated against. It has been the strong devouring the most helpless, weakest and defenseless people, the insane. The latest outrage is deinstitutionalization with a goal of integration of the insane into the community in coordination with community health service. The result so far is some patients being helped, but the jails and prisons are called the new psychiatric hospitals and many thousands of patients roam the streets homeless, an uncivilized situation.

The rule that the physically brain-disordered insane people are held to the standard of the normal, reasonable person, an impossible performanee level, stems from dicta in the English case, *Weaver v. Ward, King's Bench*, 1616, Hobart 134, 80 Eng. Rep 284. That common law rule exists all over the

United States and is in Michigan Model Civil Jury Instructions 13.03 Mental Illness-Adult. Pet. App. 79a. 1616 was the same year that the Church of Rome declared that the other planets in our solar system and the sun revolved around the earth. If you disagreed, you would be burned alive at the stake. Giordano Bruno was burned alive at the stake in 1600 for holding that the planets of the solar system including the planet earth all revolved around the sun. Galileo Galilei also held this view, was called to the inquisition in Rome, and saved himself from being burned alive at the stake by recanting his view. He was nevertheless sentenced to house arrest which was tantamount to life imprisonment. At the same time, the Church struggled with the physicians over body rights. Rene' Descartes created the solution. The Church got the head, and the physicians got the body. This Court has recognized that it must be mindful of changes that occur in society over time. The impossible "Separate But Equal" doctrine in *Plessy v Ferguson*, 163 U.S. 537 (1896) in 1896 was reversed in 1954 in *Brown v The Board Of Education*, 347 U.S. 483 (1954) recognizing that schools could not be separate and also equal. This Court also in *West Coast Hotel Co. v Parrish*, 300 U.S. 379 (1937) reversed *Adkins v. Children's Hospital of D.C.*, 261 U.S. 525 (1923) ending the Lochner decisions recognizing changed economic life. Times and conditions have changed since 1616. Science has proved that the planets of our solar system revolve around the sun. The inquisition is gone. Offenders are no longer burned alive at the stake. The devil no longer controls the human mind. Brain scans, Pet. App. 21a-24a and 41a-76a, have clearly and convincingly proved that so-called "mental illnesses" are physical brain disorders rendering the victim physically disabled and subject to Michigan Model Civil Jury Instruction 13.01 Physical Disability, Pet. App. 78a, which requires the physically disabled person to perform only to the level of a person with a similar disability. Liability insurance policies are now available which can be amended to cover damage to

people and property caused by the insane. Home owners, tenants policy, umbrella policy, auto policies, and a government sponsored uninsured fund are examples. One aspect of 1616 society is still with us, the archaic common law rule that the insane must perform to the level of the ordinary reasonable person, an impossible performance level. The rule covers the United States including Michigan because it is imposed upon our most helpless, weakest, and defenseless people, the insane with their physically disordered brains. Would the ordinary, reasonable person tolerate being required to perform to an impossible level? Never, and he is strong enough not to let that happen. This Court is asked to abolish this archaic common law rule of 1616 as being a punishment for the status of having a sickness, a physical brain disorder, in violation of the Eighth Amendment of the United States Constitution prohibiting cruel and unusual punishment, as being fundamentally unfair, shocking the conscience, uncivilized, and a discrimination against the insane in violation of the due process of law clause of the Fourteenth Amendment of the United States Constitution, and denying the insane the equal protection of the law in violation of the Fourteenth Amendment of the United States Constitution by requiring only the insane and no other citizens to perform to an impossible level and not allowing the insane with their physically disordered brains to come under the rule in Michigan Model Civil Jury Instructions 13.01, Physical Disability Pet. App. 78a, for the physically disabled providing that they need perform only to the level of a person with a similar disability.

The American Psychiatric Association has termed the words, "mental illness" a "reductionistic anachronism" with brain scans, Pet. App. 21a-24a and 41a-76a, clearly and convincingly proving that mental illnesses are physical brain disorders and seeks substitute words with the obvious solution being physical brain disorders. The title of its book

should be changed to DIAGNOSTIC AND STATISTICAL MANUAL OF PHYSICAL BRAIN DISORDERS. Pet. App. 18a.

The Michigan Model Civil Jury Instructions 13.03 Mental Illness-Adult, Pet. App. 79a, should be abolished since brain scans, Pet. App. 21a-24a and 41a-76a, have clearly and convincingly proved that so-called mental illnesses are physical brain disorders which belong in Michigan Model Civil Jury Instructions 13.01 Physical Disability, Pet. App. 78a.. Michigan Model Civil Jury Instruction 13.03, Mental Illness-Adult Pet. App. 79a is a punishment for the status of having a sickness, a physical brain disorder, in violation of the Eighth Amendment of the United States Constitution prohibiting cruel and unusual punishment, as being fundamentally unfair, shocking the conscience, uncivilized, and a discrimination against the insane in violation of the due process of law clause of the Fourteenth Amendment of the United States Constitution, and denying the insane the equal protection of the law in violation of the Fourteenth Amendment of the United States Constitution by requiring only the insane and no other citizens to perform to an impossible level and not allowing the insane with their physically disordered brains to come under the rule in Michigan Model Civil Jury Instructions 13.01, Physical Disability, Pet. App. 78a, for the physically disabled providing that they need perform only to the level of a person with a similar disability. .

Kelly was diagnosed as paranoid schizophrenic, a physical brain disorder. His maternal grandfather, diagnosed as paranoid schizophrenic died in a Michigan psychiatric hospital after many years of confinement. Some of his children had physical brain disorders. Kelly's physical brain disorder should place him in the Physical Disability Michigan Model Civil Jury Instructions 13.01 Physical Disability, Pet. App. 78a, and require him to perform only to the level of a person with a similar disability.

From time to time, policy reasons have been advanced to support the rule that the physically brain disordered insane must perform to the level of the ordinary reasonable person. All of these policy reasons are invalid. Some of them are as follows: (1) Allocates losses between two innocent parties to the one who caused or occasioned the loss even though he could not comprehend the act or prevent the consequences. Most insane people have no assets. The damaging acts of those with physical brain disorders should be covered by home owners insurance, tenants insurance, umbrella liability policies, auto policies, or a State uninsured fund. (2) Provides incentive to those responsible *for* people with disabilities and interested in their estates to prevent harm and "restrain" those who are potentially dangerous. Psychiatrists universally cannot predict which insane people will be violent. We cannot expect lay people to be better predictors. Kelly's parents never envisioned his obtaining a gun which would wound a woman. He lived in the basement of their home, and they did not know that he had a gun or how or where he acquired it. (3) Removes inducement for alleged tortfeasors to fake a mental disability in order to escape liability. People do not claim insanity in civil cases because of the horrendous social stigma attached to insanity and resulting social isolation and problems with obtaining and maintaining a job, driving restrictions, credit, and business relations. (4) Avoids administrative problems involved in courts and juries attempting to identify and assess the significance of an actor's disability. This is a routine procedure in a criminal case and in a civil case. Kelly had numerous psychiatrists, psychologists, and psychiatric social workers attesting to his insanity of paranoid schizophrenia. (5) Forces people with disabilities to pay for the damage they do if they are to live in the real world. Insane people usually have no assets. The common law rule that the insane must perform. to the level of the normal, ordinary reasonable person does not serve a legitimate governmental purpose. It is discrimination against the insane.

A. Factual Background

Kelly Scott Rundell was one of the two children of Quentin and Patricia Rundell. Kelly's brother is Quentin, Jr. The family home was in Davisburg, Michigan, a small town north of Detroit. The father, Quentin, Sr., owned an automobile body shop a few miles from Davisburg in Holly, Michigan, Kelly never married which is typical for most schizophrenics, Pet. App. 32a. He was a "C" student in high school and for a while had a girlfriend. He used drugs. After graduating from high school, he did odd jobs working for friends and for his father at the automobile body shop. He was not one for developing a career. He was behaving like a nonfunctional person, a schizophrenic. His parents were untrained and unknowledgeable in psychiatric matters, unable to recognize the symptoms of schizophrenia. Regular announcements appear on television, on radio and in the newspapers and magazines about the symptoms of heart trouble, cancer, diabetes, etc., but not the symptoms of schizophrenia. This physical brain disorder sneaks up on a family without its understanding what is happening to the member who is a victim of schizophrenia. It does not occur to other family members that the victim has suffered the "living death" of schizophrenia, that the victim has had his life stolen from him, that the victim is like a car without an engine. Most schizophrenics are so sick that in the initial stages of the physical brain disorder, they do not think they are sick. The victim does not realize that he has lost control of his life and is being driven and controlled by command hallucinations and delusions. Like most schizophrenics, Kelly had limited social contacts, Pet. App. 32a. His few friends were usually drug users. He began living at his grandmother's home a short distance down the road. His first big psychotic episode came at age 21 when he became so noisy and unruly that his grandmother called the police who took him to the Clinton Valley Psychiatric Center in Pontiac, Michigan. A few years later, this facility was torn down and replaced by a shopping

center under the State of Michigan deinstitutionalization program. After a few days, Kelly was transferred to the psychiatric department of the St. Joseph Mercy Hospital also in Pontiac, Michigan. Dr. Greene diagnosed him as having a drug-induced psychosis and prescribed Haldol as the main psychotropic medicine, a second generation antipsychotic medicine following thorazine. After 30 days, he was discharged with a prescription for Haldol which he never filled because he was too sick with the physical brain disorder, schizophrenia, to know that he was sick. His parents still did not have any understanding of schizophrenia. Kelly's use of drugs may have accelerated the appearance of symptoms of schizophrenia, but the disease would have manifested itself in any event. What his parents realized was that their son had a disease that he did not cause, that was similar to the disease his maternal grandfather also had, a disease that made him combative requiring him to be committed to the Clinton Valley Psychiatric Hospital for the remainder of his life. Kelly's parents would say, "There I go but for the grace of God." His parents hoped that the disease would disappear, but it did not. They did not realize that Kelly had to take psychotropic medicine for the rest of his life to control the physical brain disorder of schizophrenia and that the taking of the medicine had to be rigidly enforced by them.

Kelly was angry that the police had been called by his grandmother to pick him up and place him temporarily in a psychiatric hospital. He left home for a year and lived in Southern States. When he returned to home, his routine was the same. He had a few odd jobs with friends and at his father's automobile body shop. His mother thought he was improving because he played with his cats in the basement of his parent's home where he lived. She saw that he cared for his cats. But without psychotropic medicine to control the schizophrenia, he gradually worsened. He shouted noisily and tore up papers. His parents hoped that this behavior would diminish or disappear. Before he was 36, his mother devel-

oped bone and breast cancer and was being treated at a friend's home. Kelly's brother lived at another home nearby. Kelly lived in the basement of his parent's home and was alone while his father worked at the automobile body shop. Occasionally, his father would give him checks to deposit at the nearby bank. Unknown to his parents, he obtained a small shotgun and sawed it down to a smaller size. Some schizophrenics think they need the protection of a gun. On the day the gun discharged, he had deposited some checks for his father at the nearby bank. Some time before that, he had an argument with the psychiatrist who operated the counseling center near Kelly's home. Kelly was drunk at the time of the argument which was rare for Kelly. The argument was about Kelly getting a bill from a dentist in the same building where the psychiatrist was located. It was nighttime and entirely inappropriate for Kelly to be at the psychiatrist's building. The dentist later said that Kelly did not owe a dental bill. At the time of this incident, President William Clinton was in office and a man fired at the White House through the fence at the sidewalk. Kelly liked President Clinton and was upset that the shooter was stopped by a civilian before the Secret Service arrived. He thought the President should have been better protected and got drunk in protest. Kelly continuously complained about "nagging voices" which in psychiatry are called command hallucinations, Pet. App. 27a. These voices could tell Kelly to saw down a shotgun and take it to the counseling center. Kelly put the sawed-off shotgun in the car his grandmother was letting him use and drove the short distance to the psychiatrist's counseling center. As he approached the counseling center, the shotgun was sticking out of the driver's window. Kelly parked, got out of the car, and put the shotgun under his coat which he carried on his right arm. The gun was pointed at the ground. He walked slowly toward the door of the counseling center. Shirley Hunter, an employee of the counseling center was exiting the building for a smoke. She held the door for Kelly to enter, but he

waited for her to come through the door. As she was passing him, the gun still pointed downward discharged firing one shot that entered her buttock and exited her stomach causing much injury to her. The gun may have discharged accidentally. The other shots allegedly heard were echoes from the building. She played dead hoping to avoid further injury. He kicked her foot and laughed showing a symptom of schizophrenia, inappropriate laughter, Pet. App. 25a and 26a. Unlike a criminal running from the scene of the crime to avoid capture, Kelly walked slowly to his car and soon drove home where an ordinary, reasonable person would know that he would be captured. Soon the police arrived and took him into custody. He was jailed and eventually placed in one of the few Michigan psychiatric hospitals still open in Caro, Michigan. He will always have a physical brain disorder of schizophrenia requiring psychotropic medicine to control the disease. His mother and father have since died.

B. Proceedings Below

The actions in the Michigan criminal court in Oakland County have repeatedly found Kelly incompetent to stand trial. In the, civil case, the Michigan courts have acted in concert to avoid dealing with the Constitutional Law issues. In the Circuit Court of Oakland County, the court found Kelly incompetent to stand trail. The Probate Court of Oakland County also found Kelly incompetent to stand trial. At mediation, the cases of the Hunters against Quentin Rundell, Sr., Quentin Rundell, Jr., Patricia Rundell, and the Counseling Center were settled.

During one of the hearings in the Circuit Court, the Court said it was not persuaded that the law should be changed meaning that the common law rule that the insane must perform to the level of the normal, ordinary reasonable person should remain unchanged and that the Michigan Model Civil Jury Instruction 13.03 Mental Illness-Adult also requiring the insane to perform to the level of the normal, ordinary reason-

able person should remain unchanged, Pet. App. 79a. The Court granted a summary judgment to Hastings Mutual Insurance Co. against the Hunters and Kelly. The summary judgment did not contain one word about the Constitutional Law issues in the case. Pet. App. 14a-17a.

In addition to the Constitutional Law issues, Kelly in the Oakland County Circuit Court, Pet. App. 14a-17a, the Michigan Court of Appeals, Pet. App. 4a 13a, and in the applications to the Michigan Supreme Court, Pet. App. la and 2a, had to address the home owners insurance policy questions concerning the definition of an accident and whether the intentional injury exclusion clause was violated by Kelly. As Kelly approached the door at the counseling center and Shirley Hunter exited and passed him, the gun may have discharged by hitting the door or in another manner that could be determined accidental especially since the gun was pointed down and the shell entered her buttock and exited her stomach. Kelly contends that the discharge of the gun was accidental and meets the requirements of the Michigan Supreme Court definition of accident. "The policy defines the term 'occurrence' as an accident. However, the policy does not define 'accident.' In *Frankenmuth Mutual v Masters*, 460 Mich 105, 114 (1999), the Michigan Supreme Court held that the term 'accident' is not ambiguous and means 'an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated and not naturally to be expected.' Pet. App. I5a and 16a. Regarding the intentional injury exclusion clause, Michigan Courts do not follow the majority view as expressed in *COOPERATIVE FIRE INSURANCE ASSOCIATION v. COMBS*, 648 A.2d 857-860 (Vt. 1994). Kelly used this case to support his position in the Oakland County Circuit Court, The Michigan Court of Appeals, and the Michigan Supreme Court that he did not as an insane man violate the intentional injury exclusion clause and thereby lose his liability protection under the home owners insurance

policy issued by Hastings Mutual Insurance Company. Kelly claims that the Hastings Mutual Insurance Company must pay for the damages sustained by Shirley Hunter and her husband, James Hunter, as a result of the discharge of Kelly's sawed-off shotgun. The following quotes are from the case of *COOPERATIVE FIRE INSURANCE COMPANY v. COMBS*, 648 A. 2d 857 -860 (Vt. 1994). Justice Gibson presented the opinion of the Vermont Supreme Court. "One view, advocated by the intervenors, is that an insane person cannot act intentionally as a matter of law. *See Globe Am. Cas. Co. v. Lyons*, 131 Ariz. 337, 340, 641 P. 2d 251, 254 (1981); *Mangus v. Western Cas. & Sur. Co*, 41 Colo. App. 217, 585 P 2d 304, 306 (1978); *Northland Ins. Co. v. Mautino*, 433 So. 2d 1225, 1227 (Fla. Dist. Ct. App. 1983); *von Dameck V. St. Paul Fire & Marine Ins. Co.*, 361 So. 2d 283, 288 (La Ct. App.) *cert. denied*, 362 So. 2d 794 and *cert. denied* 362 So. 2d 802 (1978); *Ruvolo v. American Cas. Co.*, 39 N.J. 490, 189 A.2d 204, 209 (1963); *Nationwide Mut. Fire Ins. Co. v Turner*, 29 Ohio App. 3d 73, 503 N.E. 2d 212, 216-17 (1986). In addition to holding that intent can be imputed to rational persons only, these cases also point out that the justification for the exclusionary clause—i.e., to deny financial benefit to those who intentionally cause injury—does not exist where a person is unable to conform his behavior to normal standards and will not be influenced by a deterrent factor or financial disincentive. *See, e.g.*, 131 Ariz. At 339-40, 641 P 2d at 253-54. Moreover, this view adheres to the rule of strictly construing exclusionary clauses against the insurer, *see Ruvolo*, 189 A.2d at 208, and reinforces a policy of narrow construction in order to serve the strong public interest of providing compensation for victims. *See Congregation of Rodef Sholom v. American Motorists Ins. Co*, 91 Cal.App.3d 690, 154 Cal Rptr. 348, 352 (1979)."

"Intervenors contend that our case law is consistent with the Globe—Turner line of Cases. *See Goode v State*, 150 Vt. 651, 652, 553 A.2.d 142-43 (1988) (quoting with approval

Goewey v. United States, 222 Ct.Cl. 104, 612 F .2d 539, 544 (1979), that term 'insane' means 'a condition of mental derangement which renders the sufferer incapable of . . . understanding the nature and effects of his acts, and of comprehending his legal rights and liabilities')"

"There are more dimensions to mental illness than the nature and moral status of one's acts; mental disease or defect may encompass the will and the emotions as well. *See Salton, supra*, at 1040. An insane person whose will is impaired cannot control his conduct even when he understands the consequences of his acts, and the one who is emotionally disordered cannot feel emotions which might, in an ordinary person, provide a check to harmful conduct. *See id.*"

"We believe the determination of an insane person's intent in a civil case must take into account the multi-dimensional nature of mental disease or defect."

"For these reasons, we follow the lead of Otterman and Globe—Turner line of cases, and hold that as a matter of law an insane person is to be considered incapable of forming intent to cause injury. Cf *State Farm Fire & Cas Co. v. Wicka*, 474 N.W.2d 324, 327 n. 4 (Minn.1991) (citing cases following *Ruvolo*, and noting that leading insurance law treatises lean toward *Ruvolo* view); Mallin, 839 P2d at 112 (Handelsman, Dist. J. dissenting) ('The majority of courts have held that acts committed by an insane insured are not considered 'intentional 'for purposes of insurance coverage.') (citing cases)."

Kelly's hearing "nagging" voices which were command hallucinations drove and controlled him to saw off a shotgun and take it to the counseling center where the gun discharge took place. Intention by Kelly did not exist.

Regarding the decision of the Michigan Court of Appeals, Pet. App. 4a-13a, the court mentions schizophrenia as a physical disability at, Pet. App. 11 a, and avoids dealing with

the Constitutional Law issues by saying that they were insufficiently briefed and abandoned on appeal. The exact opposite is true. The Constitutional Law issues were raised at the beginning of the case and raised at every point thereafter. The Oakland County Circuit Court refused to deal with the Constitutional Law issues and did not mention even one word about them in its opinion granting summary judgment in favor of the Hastings Mutual Insurance Co. Pet. App. 14a-17a. Significantly, the Michigan Model Civil Jury Instructions 13.03 Mental Illness-Adult, Pet. App. 79a, admit that, "No Michigan cases have been found on this subject." The case at bar will be its first case. The Court knows that the claim that Kelly has a physical brain disorder rendering him physically disabled applies to the demand that he be determined physically disabled and come under Michigan Model Civil Jury Instructions 13.01 Physical Disability, Pet. App. 78a, in which he would only be required to perform to the level of a person with a similar disability and that would eliminate his liability in this case and the need for a summary judgment. Kelly requested the Court to reverse the summary judgment. The order of the Oakland County Circuit Court finding Kelly incompetent to testify at deposition or at trial has absolutely nothing to do with his coming under Michigan Model Civil Jury Instructions 13.01 Physical Disability, Pet. App. 78a, and be required only to perform to the level of a person with a similar disability and not under Michigan Model Civil Jury Instructions 13.03 Mental Illness-Adult, Pet. App. 79a, which requires him to perform to the level of a normal, ordinary reasonable person which is impossible for him to do. Kelly has presented numerous medical journal articles and books by authorities showing that a schizophrenic like Kelly has a physical brain disorder, and the demand has been made that he be included under Michigan Model Civil Jury Instructions 13.01 Physical Disability, Pet. App. 78a, and required to perform only to the level of a person with a similar disability which would eliminate his liability in the

case and the need for a summary judgment. Kelly requested that the summary judgment be reversed. Kelly's physical brain disorder and his demand to be included under Michigan Model Civil Jury Instructions 13.01 Physical Disability, Pet. App. 78a, are entirely germane to the case. The common law rule that the insane must perform to the level of the normal, ordinary reasonable person which is impossible is the basis of Michigan Model Civil Jury Instructions 13.03 Mental Illness-Adult, Pet. App. 79a, which also requires that the insane must perform to the level of the normal, ordinary reasonable person which is impossible. The Constitutional Law violations of this common law rule and this civil jury instruction are very well documented by Kelly. Kelly requested that this common law rule and the civil jury instruction be abolished. With Civil Jury Instruction 13.03 Mental Illness-Adult, Pet. App. 79a, abolished, Kelly along with the other people with physical brain disorders would come under Civil Jury Instruction 13.01 Physical Disability, Pet. App. 78a, and be required to perform only to the level of a person with a similar disability. Kelly very properly presented this issue for appeal.

On Pet. App. 11a and 12a, the Michigan Court of Appeals mentioned Constitutional Arguments but avoids the Constitutional Law issues, by saying arguments are not developed and have no legal support and are not properly presented for appeal. The exact opposite is true. The Constitutional Law issues were raised at the beginning of the case and raised at every point thereafter. The Oakland County Circuit Court refused to deal with the Constitutional Law issues and did not mention even one word about them in its opinion granting summary judgment in favor of Hastings Mutual Insurance Co., Pet. App. 14A 17a. Significantly, the Michigan Model Civil Jury Instructions 13.03 Mental Illness-Adult, Pet. App. 79a, admit that, "No Michigan cases have been found on this subject." The case at bar will be its first case. Kelly dealt with the violation of the Due Process of Law Clause of the Fourteenth Amendment of the United States Constitution, Pet.

App. 77a, as fundamentally unfair, shocking the conscience, uncivilized, and a discrimination against the insane for Kelly, an insane man, diagnosed paranoid schizophrenic, to be required to perform to the level of the normal, ordinary reasonable man as required by Michigan Model Civil Jury Instructions 13.03, Mental Illness-Adult Pet. App. 79a, an impossible performance level. Kelly dealt with a denial of the Equal Protection of the Law in violation of the Fourteenth Amendment of the United States Constitution, Pet. App. 77a, for Michigan Model Civil Jury Instructions 13.03, Mental illness-Adult, Pet. App. 79a, to require Kelly to perform to the level of the normal, ordinary reasonable man, an impossible performance level, while not requiring an impossible performance level of any other citizens. Kelly dealt with the cruel and unusual punishment for being sick and a discrimination against the insane to require Kelly, an insane man, diagnosed paranoid schizophrenic, to be required to perform to the level of the normal, ordinary reasonable man, as required by Michigan Model Civil Jury Instructions 13.03 Mental Illness-Adult, Pet. App. 79a, an impossible performance level, in violation of the Eighth Amendment of the United States Constitution, Pet. App. 77a. Kelly dealt with a violation of the Equal Protection of the law in the Fourteenth Amendment of the United States Constitution., Pet. App. 77a, in that Kelly's illness of paranoid schizophrenia was a physical brain disorder rendering him physically disabled and Kelly should have been included under Michigan Model Civil Jury Instructions 13.01 Physical Disability, Pet. App. 78a, and required to perform only to the level of a person with a similar disability. Kelly requested the abolishment of the Michigan Model Civil Jury Instructions 13.03 Mental Illness-Adult, Pet. App. 79a, as brain imaging, Pet. App. 21a - 24a and 41a-76a, since 1970 has given clear and convincing evidence that those illnesses are physical brain disorders rendering the victim physically disabled and that those sick people should be included under Michigan Civil Jury Instructions 13.01 Physical Disability,

Pet. App. 78a, and requiring them to perform only to the level of a person with a similar disability. Kelly requested the abolishment of the common law rule that an insane person must perform to the level of a normal, ordinary reasonable man, an impossible performance level, just as the United States Supreme Court did in overturning the "separate but equal doctrine" in 1954 because separate schools could not be equal. *Plessy v. Ferguson*, 163 U.S 537 (1896) reversed by *Brown v. The Board of Education*, 347 U.S: 483 (1954). Kelly very properly presented his Constitutional Law issues for appeal

REASONS FOR GRANTING THE PETITION

The treatment of the insane is the last frontier of civil rights. Nations are judged by how they treat their weakest people. The law is the guardian of fairness, justice, and equity. The law is ultimately the champion of the insane. The law is the protector of our most helpless, weakest, and defenseless people. For over 100 years legal scholars have written law journal articles asking that the common law rule that the insane must perform to the level of the normal, ordinary reasonable man, an impossible level of performance, be changed to a humane rule. Justice Oliver Wendell Holmes, Jr. of this Court wrote in his book, The Common Law, that if the insanity of the tortfeasor is marked, he should be excused from liability. The case at bar is an opportunity to bring fairness, justice, and equity to the insane.

The reasons for granting the petition are as follows:

1. Michigan Model Jury Instructions 13.03 Mental Illness-Adult, Pet. App. 79a, which requires the insane to perform to the level of the normal, ordinary, reasonable man, an impossible performance level, is fundamentally unfair, shocks the conscience, uncivilized, and a discrimination against the insane in violation of the Due Process Clause of the Fourteen Amendment of the United States Constitution, Pet. App. 77a.

This jury instruction touches the liberty interest of the Due Process Clause. The insane person who has a physical brain disorder which renders him physically disabled should not be required to perform to the level of the normal, ordinary, reasonable person, an impossible performance level, and should be required to perform only to a level of a person with a similar disability as provided in Michigan Model Civil Jury Instructions 13.01 Physical Disability, Pet. App. 78a. Michigan Model Civil Jury Instructions 13.03 Mental Illness-Adult, Pet. App. 79a, which requires the insane to perform to the level of a normal, ordinary, reasonable man, an impossible performance level, does not support a legitimate government interest which is having the insane pay for their damage to people or property. Usually, the insane have no assets and cannot be relied upon to pay claims caused by their damage to people or property. This jury instruction is a discrimination against the insane. Insurance policies such as home owners, tenant's insurance, umbrella liability insurance, and auto insurance can be amended to provide coverage for the damage caused to people or property by the insane. If there is no insurance, the State should have an uninsured fund as it does for auto accidents. In the case at bar, Kelly is penniless and confined to a Michigan Psychiatric Hospital. Shirley Hunter has hundreds of thousands of dollars in medical expenses. We cannot expect an archaic 400 year-old rule which did not even work in 1616 to help us today. We should use the resources available in today's economic life such as the insurance to pay for the damage to people and property caused by the insane. Jury Instruction 13.03, Mental Illness-Adult Pet. App 79a should be abolished. This jury instruction is based upon a 400 year-old archaic common law rule that the insane must perform to the level of the normal, ordinary, reasonable person which is an impossible performance level. Society and economic life are vastly different now compared to 1616, and the insane should be treated as people living in today's society and economic life. This jury instruction is wholly

irrelevant to the achievements of the States's objectives. "Due Process functions to prevent unfair and mistaken deprivations." *Heller v. Doe*, 509 U.S. 312, 332 (1993). "The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint Due Process Clause 'protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them." *Washington et al. v. Glucksberg et al.* 521 U.S. 702, 719. (1997)

The common law rule of 1616 that the insane must perform to the level of the normal, ordinary, reasonable person, an impossible performance level, was established to help those injured by insane people to take the assets of the insane as compensation. The rule was ineffective because the insane usually had no assets. The rule is just as ineffective now as it was then and for the same reason. The insane usually have no assets. Michigan Model Civil Jury Instructions 13.03 Mental Illness-Adult, Pet. App. 79a, is also ineffective for the same reason. The insane usually have no assets. The solution is liability insurance in the form of home owners, tenant's insurance, umbrella liability insurance, auto insurance, or a State uninsured fund in the event there is no insurance. The solution is not the continuation of a common law rule and jury instruction which violate the due process, equal protection, and cruel and unusual punishment provisions of the United States Constitutions and do not allow for the insane with their physical brain disorders to come under Michigan Model Civil Jury Instructions 13.01 Physical Disability, Pet. App. 78a, and be required to perform only to a level of others with a similar disability. In *Planned Parenthood of Southeastern Pa. v. Casey* 505 U.S. 833, 862, 864 (1992), this Court considered the repudiation of the Lochner decisions and said, "the clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law." Regarding, the "Separate but Equal Doctrine" of 1896 being repudiated in 1954, this Court said, "In constitu-

tional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty." The American people will also accept the repudiation of the archaic common law rule of 1616 and the same rule in Michigan Model Civil Jury Instructions 13.03 Mental Illness-Adult, Pet. App. 79a.

2. Michigan Model Civil Jury Instructions 13.03 Mental Illness-Adult, Pet. App. 79a which requires the insane to perform to the level of the normal, ordinary, reasonable person, an impossible performance level, while not requiring an impossible performance level of any other citizens denies Kelly the Equal Protection of the Law in violation of the Fourteenth Amendment of the United States Constitution, Pet. App. 77a. This jury instruction is an arbitrary and capricious act of government and does not support a legitimate goal of government which is having the insane pay for their damage to people or property. Usually, the insane have no assets and cannot be relied upon to pay claims caused by their damage to people or property. This jury instruction is a discrimination against the insane. Insurance policies such as home owners, tenant's insurance, umbrella liability insurance, and auto insurance can be amended to provide coverage for the damage caused to people and property by the insane. If there is no insurance, the State should have an uninsured fund as it does for auto accidents. In the case at bar, Kelly is penniless and confined to a Michigan Psychiatric Hospital. Shirley Hunter has hundreds of thousands of dollars in medical expenses.

City of Cleburne, Texas, et al. v. Cleburne Living Center, Inc., et al. 473 U.S. 432 (1985) dealt with housing for the mentally retarded and examined equal protection of the law issues. A jury instruction that distinguishes between the insane and others must be rationally related to a legitimate

governmental purpose which in this case is taking assets of the insane to pay for damages to the victim or the victim's property. However, the insane usually do not have assets. The jury instruction is not effective in compensating the victim and is not rationally related to a legitimate governmental purpose. The solution is liability insurance protection to pay the claims of the victims. If there is no insurance, the State should pay the claims of victims through an uninsured fund as it does for auto accidents. This jury instruction is arbitrary and irrational and a prejudice against the insane. Through ignorance and prejudice the insane have been subjected to a history of unfair and often grotesque mistreatment.

3. It was cruel and unusual punishment for being sick and a discrimination against the insane to require Kelly, an insane man, diagnosed paranoid schizophrenic, to be required to perform to the level of the normal, ordinary, reasonable man, as required by Michigan Model Civil Jury Instructions 13.03, Mental Illness-Adult, Pet. App. 79a, an impossible performance level, in violation of the Eighth Amendment of the United States Constitution, Pet. App. 77a.

Trop v. Dulles, Secretary of State, *et al.* 356 U.S. 86, 99, 100, 101, 102 (1958) focuses on the cruel and unusual punishment issue. "The question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment." "The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this court." "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." "*Weems v. United States*, 217 U.S. 349. The court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a

maturing society." "This punishment is offensive to cardinal principles for which the Constitution stands." Kelly is punished for being insane by being required to perform to the level of the normal, ordinary, reasonable man, an impossible performance level. The jury instruction 13.03 Mental Illness-Adult, Pet. App. 79a and the common law rule that the insane must perform to the level of the normal, ordinary, reasonable person, an impossible performance level, are uncivilized.

Justice Stewart wrote in Robinson v. California 370 U.S. 660, 678 (1962) "We would forget the teachings of the Eighth Amendment if we . . . . permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action." The jury instruction 13.03 Mental Illness-Adult, Pet. App. 79a, punishes Kelly for being insane by requiring him to perform to the level of the normal, ordinary, reasonable person, an impossible performance level. The jury instruction is an act of barbarism.

4. It is a violation of the equal protection of the law clause of the Fourteenth Amendment of the United States Constitution in not holding that Kelly's illness of paranoid schizophrenia is a physical brain disorder rendering him physically disabled under Michigan Model Civil Jury Instructions 13.01 Physical Disability, Pet. App. 78a, requiring him to perform only to the level of a person with a similar disability.

Kelly with his physically disordered brain rendering him physically disabled is entitled to come under jury instruction 13.01 Physical Disability, Pet. App. 78a, and be required to perform only to the level of a person with a similar disability. "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the Laws,' which is essentially a direction that all persons similarly situated should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216 (1982)." *City of Cleburne, Texas, et al. v. Cleburne Living Center, Inc., et al.* 473 U.S. 432, 439 (1985)

5. Michigan Model Civil Jury Instructions 13.03 Mental-Illness-Adult, Pet. App. 79a should be abolished as brain imaging, Pet. App. 21a-24a and 41a-76a has given clear and convincing evidence that those illnesses are physical brain disorders rendering the victim physically disabled and that those sick people should be included under Michigan Model Civil Jury Instructions 13.01 Physical Disability, Pet. App. 78a, and required to perform only to the level of a person with a similar disability. Bi-Polar physical brain disorder, also known as Manic-depressive disease is second in severity only to schizophrenia. Manic-depressive disease was held to be a physical brain disorder in *Arkansas Blue Cross and Blue Shield v. Doe*, 22 Ark. App. 89, 733 S.W. 2d 429 (1987). Autism was held to be a physical brain disorder in *Daniel Kunin v. Benefit Trust Life Insurance Company*, 696 F. Supp. 1342 (1988).

The United States diagnostic authority for psychiatrists, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION TEXT REVISION, DSM=IV, tm, says on page XXX Introduction that the term "Mental " disorders is a "reductionistic anachronism" and that a substitute term is Needed. The solution is to call the disorders what they really are, Physical Brain Disorders, Pet. App. 18a.

6. The common law rule that the insane must perform to the level of the normal, ordinary, reasonable person, an impossible performance level, must be abolished..

It violates the Due Process of Law Clause and the Equal Protection of the Law Clause of the Fourteenth Amendment of the United States Constitution, Pet. App. 77a, and the Cruel and Unusual Punishment provision of the Eighth Amendment of the United States Constitution, Pet. App. 77a.

This common law rule is the basis of Michigan Model Civil Jury Instructions 13.03 Mental Illness-Adult which should also be abolished for violating the Due Process of law

Clause and the Equal Protection of the Law Clause of the Fourteenth Amendment of the United States Constitution, Pet. App. 77a, and the Cruel and Unusual Punishment provision of the Eighth Amendment of the United States Constitution, Pet. App. 77a.

This common law rule was established in 1616 to take the assets of the insane for their damaging people or property and compensate the injured party. However, the insane usually have no assets making this common law rule ineffective. It is still ineffective today. The solution is liability insurance to compensate the injured party. If there is no insurance, the State should have an uninsured fund as it does for auto accidents.

Just as this Court repudiated *Plessy v. Ferguson*, 163 U.S. 537 (1896) through *Brown v. Board of Education*, 347 U.S. 483 (1954) because it was impossible to have separate schools which were equal, this Court should repudiate the common law rule that the insane must perform to the level of the normal, ordinary reasonable person because it is impossible for the insane to perform at the level of the normal, ordinary, reasonable person.

In another impossibility case, *Logan v. Zimmerman Brush Co*, 455 U.S. 422 (1982), State Law required that the employment discrimination claims be processed by the State Commission within 120 days; and, if they were not processed, they were dismissed, even though it was the commission's fault that they were not processed. The Court held that to dismiss the claim for this reason violated the Due Process Clause and the Equal Protection of the Law Clause of the Fourteenth Amendment of the United States Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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